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PUBLIC EMPLOYMENT
RELATIONS BOARD

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JAMES A. HUNSAKER III,)	
)	
Petitioner,)	AA NO. 1850
)	
vs.)	
)	
PUBLIC EMPLOYMENT RELATIONS)	RULING ON APPEAL
BOARD OF THE STATE OF IOWA,)	
)	
Respondent.)	

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POLK COUNTY IOWA
FILED

Oral argument in regard to appeal of the above-captioned matter came on before the undersigned Judge on the 10th day of June, 1992. Attorney David H. Goldman appeared on behalf of Petitioner, James A. Hunsaker III. Attorney Jan V. Berry appeared for the Respondent, Public Employment Relations Board. The Court having considered the record, including the briefs and arguments of counsel, finds and rules as follows.

STATEMENT OF THE CASE

This is a proceeding for judicial review of final agency action of the Public Employment Relations Board (PERB) brought pursuant to Iowa Code Section 17A.19.

The Petitioner, James A. Hunsaker III, was discharged as an employee of the Iowa Department of Employment Services (DES), and appealed to the director of the Iowa Department of Personnel (IDOP) pursuant to Iowa Code Section 19A.14(2), and then appealed IDOP's adverse decision to PERB, also as provided for by Section 19A.14(2).

After an evidentiary hearing before a PERB administrative law judge who issued a proposed decision and order upholding Hunsaker's discharge, Hunsaker sought review by the full PERB pursuant to Iowa Code Section 17A.15(3) and PERB rules. PERB issued its Decision on Appeal on August 14, 1991, upholding Hunsaker's discharge.

It is PERB's Decision on Appeal, final agency action pursuant to Section 19A.14(2), which is the subject of the judicial review proceeding herein.

FINDINGS OF FACT

This Court finds that:

1. It has jurisdiction over the subject matter of this action and over the parties hereto..
2. This is an application for judicial review of an adverse decision in a contested case after all administrative remedies have been exhausted.
3. Except as otherwise modified or amplified by the Court in its "Conclusions" hereunder, the Court adopts and incorporates herein by reference the "Findings of Fact" as contained in the Decision on Appeal (pages 2-35) issued by the PERB board in regard to the above-captioned matter and dated the 14th day of August, 1991.

CONCLUSIONS

The ultimate question presented to this Court upon the appeal herein is whether or not there was final action, in the form of discipline or other type of final action, by the DES concerning James Hunsaker's fiscal year 1989 job performance prior to Director Eisenhower's discharge of Mr. Hunsaker.

Although this Court has adopted and incorporated herein by reference the "Findings of Fact" as issued by the PERB board in its Decision on Appeal, a short synopsis of the facts would be appropriate herein.

SYNOPSIS OF FACTS

The Petitioner, James A. Hunsaker III, was first employed by the DES in 1972, and advanced through a number of positions within that agency until in 1986 he was promoted by the then-DES director Richard G. Freeman to the position of chief of the Field Operations Bureau (FOB) within DES's Division of Job Service. The FOB is the largest organizational component within DES.

Included in Hunsaker's major responsibilities was the responsibility for monitoring the Bureau's budget and staffing. He was also expected to maintain FOB's staff and financial allocations at authorized levels.

During the fiscal year ending June 30, 1989, Hunsaker received monthly financial reports which showed that FOB was staffed beyond its allocation and which projected the Bureau's overexpenditure of the public funds it had been allocated.

Although alerted to these circumstances, Hunsaker did nothing to remedy the situation, and, in fact, he even authorized more expenditures. By the end of fiscal year 1989, Hunsaker had authorized FOB staffing and expenditures which exceeded the Bureau's previously established allocations by what was then believed to be \$1.2 million. Also during the first quarter of fiscal year 1990, Hunsaker continued to staff FOB beyond its allocations. The DES Financial Management Committee warned Hunsaker that it had not noted any change in his fiscal year 1989 hiring or purchasing practices.

A major portion of DES's operating funds were received from the federal government to enable DES to administer various federal programs, most notably the Employment Services and Unemployment Insurance programs.

By October 1989 questions concerning DES's financial responsibility were raised by both the media and members of the General Assembly. Also, Freeman evaluated Hunsaker's performance for the twelve-month period ending October 31, 1989. The evaluation, although rating Hunsaker's overall performance as between competent and very good, reflects Freeman's perception that Hunsaker had totally failed in his budget-compliance duties.

Freeman and Hunsaker were close personal friends, and Freeman had been in a supervisory position over Hunsaker for fourteen years. Freeman was fully aware of the heat which was being generated by the media and legislative attention on the

agency. He recognized that Hunsaker's relationship with other Bureau chiefs had deteriorated due to FOB's fiscal year 1989 overexpenditures and thought it advisable to get Hunsaker out of Des Moines and DES's central administration until things cooled off.

Freeman and Jacqueline Mallory, head of the DES Human Resource Unit, discussed a number of personal actions. With regard to Hunsaker, Freeman mentioned termination, temporarily transferring him from Des Moines to a district supervisory post and subsequently bringing him back to the agency's central administrative offices as chief of the Staff Services Bureau (whose present chief was approaching retirement), or as head of a new DES data information unit. Freeman discussed with Hunsaker the idea of accepting the district supervisor position in Cedar Rapids. Hunsaker initially declined, believing this was a demotion. Freeman, however, felt this move would be in their best interests. Thus, Freeman and Hunsaker negotiated (voluntarily) an agreement to transfer Hunsaker to Cedar Rapids as a district supervisor, and Hunsaker would in turn receive certain perks. In his FOB chief position, Hunsaker was classified as a Public Service Executive IV (PSE IV). Under his new deal with Freeman, Hunsaker would retain his PSE IV classification and suffer no reduction in pay, and would also receive 45 days of living expenses, letters of commendation, the use of a state car, moving of his household goods, office furniture and

office computer, additional remodeling permission, and permission to take his assistant with him if she elected to go, all at state expense.

Per Freeman's instructions, on November 18, 1989, Mallory requested Iowa Department of Personnel (IDOP) approval of Hunsaker's temporary reassignment. On November 27, 1989, Hunsaker submitted his written request for reassignment to the Cedar Rapids district supervisory position to Freeman. Hunsaker stated that he wanted to be a "team player." On December 22, 1989, this restructuring became effective. (Also on this date Cynthia Eisenhower was appointed by the governor as Freeman's replacement as DES director, to be effective January 8, 1990.)

On January 8, 1990, Freeman left the state employment and Eisenhower took over. Through media reports and earlier DES meetings, Eisenhower learned that the agency was in financial trouble. Within two weeks Eisenhower met with the current Bureau chiefs and a deputy state auditor and heard their views that the agency's overexpenditures during fiscal year 1989 had been the result of Hunsaker's spending and hiring practices as FOB chief. On January 23, 1990, a state auditor wrote Senator Running with the results of the auditor's special examination. Eisenhower had also received a copy of this letter. Thus, later that same day Eisenhower met with Hunsaker. At the conclusion of that meeting Eisenhower presented Hunsaker with a discharge letter which she had previously prepared for her use in the event she decided to

discharge Hunsaker, and which informed Hunsaker of his termination effective at the end of the day.

CONCLUSIONS

Both Petitioner and Respondent agree herein that if Hunsaker's temporary reassignment to Cedar Rapids was disciplinary action for his fiscal year 1989 malfeasance which became DES's final agency action, DES was precluded from later dismissing him as a result of that same misconduct. Hall v. Merit Employment Commission, 380 N.W.2d 710 (Iowa 1986), holds that such subsequent discipline would violate Section 19A.9(16) and IDOP Rule 11.2.

Having considered the facts presented to the Court herein, the Court concludes Hunsaker's temporary reassignment to Cedar Rapids was not disciplinary action which became DES's final agency action.

Iowa Code Section 19A.9(16) mandates IDOP's adoption of rules concerning the discipline of merit system employees. IDOP Rule 11.2 is set forth in PERB's decision on appeal and enumerates four specific forms of discipline (suspension, reduction of pay within the same pay grade, disciplinary demotion and discharge). The Court finds substantial evidence in the record to support PERB's finding that Hunsaker's temporary reassignment to Cedar Rapids was not a suspension, a reduction of pay within the same pay grade, a discharge or a disciplinary demotion.

As previously noted, Freeman and Hunsaker were close friends. Freeman fully knew of Hunsaker's miserable fiscal year 1989 performance, but at first did nothing about it. Not until the media and the legislature focused "heat" on this matter did Freeman (and later Hunsaker) realize it would be in their best interests to allow matters to "cool off" for a while.

After considering his options, Freeman decided that a temporary reassignment of Hunsaker to Cedar Rapids would be best. Hunsaker initially declined this offer, but volunteered to go when lucrative benefits were offered. These actions are not indicative of the imposition of discipline. Freeman merely moved his friend temporarily out of the heat while keeping other options open. Hunsaker accepted this temporary transfer and received lucrative perks. Hunsaker received no reduction in salary. He was reimbursed for living and moving expenses and authorized to remodel, received a company car, and had the authority to bring his assistant to Cedar Rapids should she choose to do so. Clearly these actions, along with the recommendation of a salary increase by Freeman, seem much more indicative of friendship than of discipline. Moreover, Freeman did not issue a written notice of discipline to Hunsaker upon his reassignment, as would be required by Section 11.20 of the IDOP manual, because this was not discipline or other final agency action. This move was temporary.

Since this temporary action does not constitute any disciplinary or final action, the Court concludes the Hall decision, *supra*, inapplicable. This Court concludes no final action had been taken against Hunsaker until his dismissal. Since no final action or discipline had been taken prior to Hunsaker's dismissal, the "double jeopardy" provision in Hall does not apply.

The test of whether Eisenhower was precluded from dismissing Hunsaker is not whether the evidence shows that Freeman might have intended future discipline, as Hunsaker suggests, but whether Freeman (or the agency) had taken any final action regarding Hunsaker's fiscal year 1989 conduct. Hall, supra, and Franklin v. Iowa Dept. of Job Service, 277 N.W.2d 877, 881 (Iowa 1979).

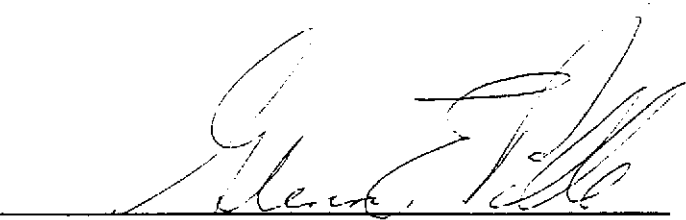
This Court concludes no final agency action had been taken against Hunsaker regarding his fiscal year 1989 malfeasance, and accordingly Director Eisenhower was not precluded from dismissing him for such misconduct.

The decision of the PERB should be affirmed.

ORDER

IT IS THEREFORE ORDERED that the decision rendered by the Public Employment Relations Board as contained in its Decision on Appeal filed August 14, 1991, regarding the above-named Petitioner be and the same is hereby AFFIRMED; Petitioner's Petition for Judicial Review should be and is hereby DISMISSED.

DATED this 26th day of June, 1992.


GLENN E. PILLE, Judge
Fifth Judicial District of Iowa

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METHOD OF DISPOSITION

<input type="checkbox"/>	TRIAL TO JURY
<input checked="" type="checkbox"/>	TRIAL TO COURT
<input type="checkbox"/>	GUILTY/DEFAULT
<input type="checkbox"/>	DISMISSED/TRANSFERRED
<input type="checkbox"/>	BY CLERK